

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

APPLERA CORPORATION,

Plaintiff and Appellant,

v.

MP BIOMEDICALS, LLC,

Defendant and Appellant.

G038984

(Super. Ct. No. 05CC09341)

ORDER MODIFYING OPINION
AND DENYING PETITION FOR
REHEARING; NO CHANGE IN
JUDGMENT

It is ordered that the opinion filed herein on April 30, 2009, be modified as follows:

On page 27, line 8, immediately after the sentence, “With regard to the doctrine of forfeiture we note only that Swiss law was timely raised with regard to the attorney fee issue,” add as footnote 14 the following footnote:

¹⁴ Citing *Hurtado v. Superior Court* (1974) 11 Cal.3d 574, defendant claims plaintiff forfeited the right to rely on Swiss law by failing to “timely invoke” Swiss law. (*Id.* at p.581 [“generally speaking the forum will apply its own rule of decision unless a party litigant timely invokes the law of a foreign state”].) But *Hurtado*, which analyzed a conflict of law dispute in a wrongful death action involving Mexican citizens, offers no guidance in the instant case. (*Id.* at pp. 580-581.)

Hurtado does not discuss or define the point of time at which the invocation of foreign law becomes untimely. In the absence of any showing that the invocation of a Swiss rule of decision would have made any difference in the outcome had it been invoked earlier, the invocation, at the time the Swiss rule *did* make a difference, was timely. *Hurtado* is similarly unhelpful with regard to the choice of Swiss law as the substantive rule of decision. *Hurtado* applied a “governmental interest approach” to decide a choice of law issue in a *tort* action, not involving an agreement by the parties that chose the rule to apply. (*Id.* at pp. 579-582.) In contrast, *Nedlloyd, supra*, 3 Cal.4th 459, provides the appropriate guidance where, as here, the issue is the enforcement of the law *chosen by the parties* as the rule of decision.

The petition for rehearing is DENIED.

There is no change in the judgment.

IKOLA, J.

I CONCUR:

FYBEL, ACTING P. J.